been justified by the defendant's default in payment. Under the previous analysis of the subject, the decision was incorrect upon either hypothesis.

EFFECT OF TRANSFER OF SHARES UPON STATUTORY LIABILITY OF STOCKHOLDER.—During the first half of the last century, a provision for the personal liability of the stockholders upon corporate debts was generally inserted in corporation statutes and charters; of late years this has been chiefly confined to corporations whose capital is not fully paid up, debts due for labor, and the indebtedness of banking institutions. Although this liability is purely statutory, the statutes have usually been silent as to the passing of the liability with a transfer of the shares, thus leaving this question to the courts.

From the start a conflict of opinion developed. *Middletown Bank* v. *Magill* (1823) 5 Conn. 28. The earliest statutes made the liability of each stockholder co-extensive with that of the corporation *Southmayd* v. *Russ* (1819) 3 Conn. 52; *Allen* v. *Sewall* (1829) 2 Wend. 327. It was generally held that the obligation rested upon a true contract; *Corning* v. *McCullough* (1847) 1 N. Y. 47; that the stockholders were liable as principal debtors; *Hargis* v. *McCullough* (1846) 2 Den. 119; *Mokelumne Co.* v. *Woodbury* (1859) 14 Cal. 265; or as sureties, *Hanson* v. *Donkersley* (1877) 37 Mich. 184, substantially as partners, *Deming* v. *Bull* (1835) 10 Conn. 409; that their personal credit was relied on by the creditors, *Moss* v. *Oakley* (N. Y. 1842) 2 Hill 265; *Chesley* v. *Pierce* (1855) 32 N. H. 388; and that the remedy might be by action at law. *Bank* v. *Ibbotson* (1840) 24 Wend. 473. It was accordingly held in a line of New York cases that a shareholder still remained liable on debts of the corporation contracted while he held his stock, even though he transferred it in good faith. *Moss* v. *Oakley*, supra; *Judson* v. *Rossie Galena Co.* (N. Y. 1842) 9 Paige 598. These decisions had their influence on later cases in this country, even when the statutes and conditions had changed. *Tracy* v. *Yates* (1854) 18 Barb. 152; *Williams* v. *Hanna* (1872) 40 Ind. 535; *Hager* v. *Cleveland* (1872) 36 Md. 476.

Two theories of the nature of the stockholder's statutory liability have been recognized: the one based on contract, the other on quasi-contract. 5 COLUMBIA LAW REVIEW 606. Upon the contract theory, the question of whether the liability devolves upon a transfer of the stock, depends upon whether such transfer can constitute an implied novation. Where, as in the early cases, corporations were small and each stockholder liable for the whole amount of the debts, the personal credit of its stockholders was an important factor, relied upon by the creditor. Moreover, the number of stockholders was limited and transfers less frequent. Under such circumstances it was difficult to work out a real novation and so relieve the transferor from liability. *Moss* v. *Oakley*, supra. But this argument loses its force under the modern conditions of numerous stockholders, limited liability and frequent transfers. The creditor does not look to the personal credit of the individual stockholders, but only to the general credit of the corporation. It seems, therefore, as if to-day a novation in fact may properly be grounded upon the creditor's agreement

with the corporation. *Root* v. *Sinnock* (1887) 120 Ill. 350; 2 Morawetz, Corp. § 888. Under the better and more modern theory of the stockholder's liability, that it is a pure quasi-contract founded upon the positive command of the statute, *Hawkins* v. *Furnace Co.* (1884) 40 Oh. St. 507; *McClaine* v. *Rankin* (1905) 197 U. S. 154; 5 COLUMBIA LAW REVIEW 606, the same result may be reached. The question is then one purely of policy, and the preceding considerations apply with equal force. Moreover, to hold a stockholder liable after he has transferred his shares, is to leave him still a member as to the losses, but not as to the profits and the control of the business. *McClaren* v. *Franciscus* (1869) 43 Mo. 452. Under the continually changing membership of modern corporations such a doctrine results in confusion and greater difficulty in the creditor's enforcement of his remedy. *Barton Nat'l Bank* v. *Atkins* (1899) 72 Vt. 33; see *Nat'l Bank* v. *Plow Co.* (1894) 58 Minn. 167, 169. These considerations seem to have had influence in the drafting of the modern statutes, for although they are not uniform, the more frequent policy at present is toward placing the liability upon the present stockholder. U. S. R. S. § 5139; N. Y. Banking Law § 53; cf. N. Y. Stock Corp. Law § § 54, 55; see *Foster* v. *Row* (1899) 120 Mich. 1, 13. When the question has been left open for the courts, the tendency on their part is now toward the same result. *Day* v. *Vinson* (1890) 78 Wis. 198, 200; *Ball Co.* v. *Child* (1897) 68 Conn. 522; *Barton Nat'l Bank* v. *Atkins*, supra; *Foster* v. *Row*, supra; *Maine Trust Co.* v. *Loan Co.* (1899) 92 Me. 445.

The peculiar result, that a former stockholder and his transferee are both liable, was reached in construing a former Massachusetts statute, *Holyoke Bank* v. *Burnham* (Mass. 1853) 11 Cush. 183; followed in *Sayles* v. *Bates* (1886) 15 R. I. 342. This conclusion is hard to support on any principle; it cannot be reconciled with the idea of a novation, and is unnecessary on any ground of policy. The Ohio courts have held, in interpreting a similar statute (which has recently been repealed), that the transferor remains liable, the transferee, by the act of accepting the shares, impliedly agreeing to indemnify him; so that, upon the equitable principle that the persons ultimately liable are to be first looked to for payment, the transferee is first called upon to pay, and only in the event of his insolvency or absence from the jurisdiction, is recourse had to the former stockholder on a pro rata basis. *Brown* v. *Hitchcock* (1881) 36 Oh. St. 667; *Wick Bank* v. *Union Bank* (1900) 62 Oh. St. 446. This procedure has also been followed in Minnesota. *Nat'l Bank* v. *Plow Co.*, supra. It is, however, complicated and cumbrous in its operation. See *Harpold* v. *Stobart* (1889) 46 Oh. St. 397, 401; *Barrick* v. *Gifford* (1890) 47 id. 180. In a recent case, however, *Poston* v. *Hull* (1907) 80 N. E. 11, where the stockholders had been assessed twenty-six per cent each, and the defendant's transferee had become insolvent, the Supreme Court of Ohio held that defendant's liability could not be enforced until all the present solvent stockholders had been assessed the full amount of their stock. As this threw the burden of the transferee's insolvency on the present solvent stockholders, instead of upon the transferor, it seems that the case showed a disposition on the part of the court to relieve from liability those who had ceased to be identified with the corporation as stockholders, in so far as this could be done without overturning their own

previous decisions, and a tendency to conform to the more modern policies of the law.

CONSTITUTIONALITY OF THE NEW YORK TRANSFER TAX UPON TRANSFERS OF PROPERTY BY POWERS.—By the amendment of 1897 to the transfer tax of New York, Chap. 284, Laws 1897, it was provided that the exercise of a power of appointment derived from any disposition of property made either before or after the passage of the Act should be a transfer and taxable. The constitutionality of this amendment has been repeatedly upheld in the state courts. *In re Vanderbilt* (1900) 50 App. Div. 246; reversed, 167 N. Y. 227; *In re Dows* (1901) 167 N. Y. 227; and the latest decision on the point, *In re Delano* (1903) 176 N. Y. 486, has recently been affirmed in the United States Supreme Court, *Chanler* v. *Kelsey* (1907) 37 N. Y. Law Jour., No. 25, on the ground that it did not involve a taking of property without due process of law. The decisions have been upon substantially the same set of facts: before the passage of the Act, A, deeds or wills property to B for life, remainder over to B's issue, C and D, in fee; but with power in B to appoint the remainder by will between C and D. After the passage of the Act, B dies, and by will appoints the remainder to C. The devise or deed thus, in effect, creates "powers with estates limited in default of their being executed." 2 Sugden, Powers, 33; and in such a case the remaindermen take a vested interest in fee, subject to be divested by the execution of the power. 2 Sugden, Powers, 4; Fearne, Con. Rem. 226. This principle was long ago recognized in New York, *Hawley* v. *James* (1835) 5 Paige 318, and is now embodied in the Real Property Law, § 31. The donee of the power, B, had no interest in property to devise and his will in the principal case, therefore, did not convey any interest to the appointee as a devise but merely through its operation as a means of executing the power conferred upon him. 2 Sugden, Powers, 26, 33. The execution of the power thus caused a transfer from the remaindermen to the appointee and involved solely a transfer *inter vivos* and not by succession. It would seem immaterial, therefore, whether the power was exercised by will or deed; or that the appointee was a remainderman by the deed creating the power, since "every power operates as a power of revocation and new appointment." 2 Sugden, Powers, 32.

The dissenting opinion by Justice Holmes in the principal case clearly pointed out that the particular tax in question was not a succession tax and held that as the statute provided for a tax on successions and was so considered by the state courts, the amendment was unconstitutional. While some of the New York cases have spoken of the tax as a succession tax, *Matter of Delano*, 176 N. Y. 486, 494; *Matter of Dows*, supra, the decisions have been based upon the correct theory that the appointee took his estate not from the donor but from the remaindermen; *Matter of Dows*, supra; and a transfer *inter vivos* would seem to be properly included in the amendment which covers "Taxable transfers." Chap. 284, Laws 1897. The majority opinion on the other hand while clearly analyzing the method by which the estates were vested and divested, did not seem to treat the tax as one upon transfers *inter vivos*, but simply referred to the conclusiveness of the state decisions upon questions of the